

FRAUD AND CORRUPTION
IN
BOSNIA AND HERZEGOVINA:
A PROPOSAL FOR SYSTEMIC REFORMS
SUBMITTED TO USAID/BOSNIA HERZEGOVINA

March 23, 1998

Stephen A. Mansfield, Esq.

TABLE OF CONTENTS

I. INTRODUCTION	1
II. SUMMARY	1
III. PROPOSED LAWS.....	3
A. Draft Public Disclosure Laws	3
B. Draft Substantive Criminal Fraud Laws.....	4
C. Draft Obstruction of Justice Laws.....	4
D. Draft Corporation and Entity Liability Laws	4
E. Review Draft Money Laundering Law; Draft Forfeiture Laws.....	4
F. Definition of “Official” in the Bribery Statute	5
IV. DEVELOPMENT OF A FEDERATION ENFORCEMENT SYSTEM	5
A. Draft Constitutional Analysis.....	5
B. Prepare Legislative Strategy.....	6
1. Advocacy Memorandum.....	6
2. Persuading BH Officials/Building Fraud and Corruption Cases	6
C. Draft Necessary Legislation	8
D. Prepare Plan for Investigators	8
V. LEGAL TRAINING AND COMMUNITY EDUCATION	1

I. INTRODUCTION

USAID in Bosnia and Herzegovina ("BH") requested an assessment of the government fraud and corruption problems in the BH Federation. Over an approximate two-week period, numerous meetings and interviews concerning fraud and corruption issues were conducted in Sarajevo with: USAID officers, USAID contractors, BH Federation ministers, members of Parliament, ombudsmen, judges, prosecutors, police, a BH minister, an Anti-Corruption Commission representative, OHR representatives, a U.S. Embassy official, EC CAFAO officials, the U.N. Legal Advisor and IPTF Deputy Commissioner, the A.B.A. CEELI Director, Deans of the Law School and Criminal Science Faculty and certain NGO staff. Cantonal government and law enforcement officials in Travnik also were interviewed concerning judicial, law enforcement and business crime issues.

In addition, numerous economic, political and legal reports from the above-listed offices and other offices were reviewed. The draft BH Federation criminal code and applicable constitutional provisions were analyzed.

Based on this assessment, priority systemic reforms to counter fraud and corruption in the BH Federation are proposed.

II. SUMMARY

For the economic and democratic development of Bosnia and Herzegovina to succeed, the large-scale fraud and corruption in the government must be reduced substantially. Bank fraud, customs fraud, tax fraud, procurement fraud, bribery, extortion and an active organized crime network severely undermine economic and democratic reforms. The losses resulting from fraud and corruption appear massive, yet cannot be quantified accurately due to the lack of transparency in government and business operations. Public funds must be subject to accurate public accounting. The apparent fraudulent diversion of profits from public companies must be stopped. These diverted funds, and other public funds, may be financing political party activities and the continued existence of institutions of the prior government. This directly threatens the new government's legitimacy, perpetuates ethnic divisions and is hostile to the rule of law.

A lack of public disclosure and accountability of public funds makes discovering and proving the scope of fraudulent activities in government impossible. Public access to accurate and complete government accounting records must be required by law. False records and fraudulent accounting or diversion of public funds must be subject to criminal penalties. Violations of these criminal laws must be enforced vigorously.

An inadequate institutional structure for law enforcement presently precludes successful prosecution of government fraud, corruption and complex white collar crime.

A long-standing pattern of fraudulent, corrupt and extortionate conduct by public officials created a culture of corruption at all levels of citizen interaction with government. Citizens must learn from experience and education that government officials hold a public trust to serve the people. The rule of law must be understood clearly by public officials, company managers and the citizenry if they are to trust and follow it. Domestic and foreign investors also must see that applicable laws are enforced in a fair, consistent and lawful manner against corrupt public officials, party leaders and company managers.

The problems are large. Systemic institutional and legal reforms are needed. Three steps should be taken.

First, in the next few months, certain key public disclosure and anti-corruption laws should be drafted and proposed to the Parliament for consideration. Obstruction of justice, money laundering and witness protection laws are also needed. These laws will supplement the provisions in the proposed criminal code by filling critical gaps that currently impair effective prosecution of fraud and corruption in government.

Second, institutional changes in the courts and law enforcement offices are needed to ensure that anti-corruption and fraud laws are enforced fully and effectively. The changes necessary will require legislative drafting, constituent building and legislative advocacy. Preparatory investigative work also may be necessary. Given the magnitude of the current problems, the reform process should begin soon. The institutional structure must facilitate a fair, unbiased and vigorous enforcement system. It should promote the public's trust and confidence. A strong, independent and well-trained Federation-wide enforcement system is needed to combat fraud and corruption in government operations. The problems are national and international in scope and effect. There is no actual Federation enforcement system in place despite constitutional provisions that expressly mandate such a system. The current decentralized Cantonal enforcement system, while important for addressing local criminal activity, creates a breeding ground for government corruption and fraud. These cases necessarily involve wealthy and powerful individuals and/or organizations that exert pressure and influence on a small local enforcement system. Jurisdiction for these politically sensitive and complex offenses must be in a strong, independent and centralized law enforcement and judicial system. Further, witnesses, investigators, prosecutors and judges must be provided the institutional and legal support and protection necessary to play their vital role in the law enforcement process.

Finally, a comprehensive project of legal training and community education is needed. Judges, prosecutors and investigators must receive critical legal training concerning corruption laws and effective investigative methods and strategies. All government officials and experts interviewed during this assessment requested such assistance. This anti-corruption training should be combined with training concerning the new criminal

code, which should be enacted in the next few months. This training should begin upon final passage of the criminal code. Preparation for this training should begin immediately. Similar training should begin upon enactment of the anti-corruption laws proposed herein. Furthermore, citizens, civil servants and public officials must learn the standards of ethical and legal conduct expected from public servants responsible for the public trust. The media, law schools and community groups must be involved. This comprehensive training and education component must be a long-term, sustained effort in order to implement successfully these anti-corruption reforms.

It should be noted that the above-described systemic reforms for the BH Federation ultimately should be implemented at the State level in a uniform manner for the same reasons articulated herein. A number of government officials strongly concur with this recommendation.

III. PROPOSED LAWS

Public disclosure laws, obstruction of justice laws and witness protection laws must be enacted. Certain substantive criminal fraud statutes should also be considered. Below is an overview of the work necessary.

A. Draft Public Disclosure Laws

Comprehensive public disclosure laws with criminal penalties should be enacted for government agencies, public companies, political parties and public officials. Full disclosure of monies received and expended, as well as assets and liabilities, must be required. These detailed financial reports must be available for public inspection. Public officials and designated officers from agencies or organizations must be required to sign and certify that the disclosures are true, correct and complete. An intentional false disclosure report must be a crime punishable by jail time. An independent Inspector General Office for auditing and investigating compliance with such disclosure laws also must be created by law. This office should be required to refer indications of non-compliance or fraud in connection with disclosure reports to the independent BH Federation prosecutor's office, described below in Section IV of this report.

A team of legal, economic and accounting experts will need to work with key government officials in establishing appropriate accounting standards and drafting the disclosure laws pertaining to government agencies or public companies. An attorney experienced in prosecuting fraud and corruption cases should draft the financial disclosure statute for public officials. The U.S. statute would be an excellent model. Also, conflict of interest laws for government officials should be drafted based on applicable U.S. laws.

B. Draft Substantive Criminal Fraud Laws

The current draft criminal code contains basic fraud and corruption provisions. To define particular types of economic crime clearly and further serve to educate and deter the regulated community, substantive fraud statutes should be enacted in the areas of government procurement, banking, customs, tax and possibly privatization.

While general fraud and/or embezzlement statutes arguably apply to such offenses, specific substantive laws focusing on particular areas of economic activity send the unequivocal message that such improper conduct is a crime and will not be tolerated.

An experienced attorney, technical expert and a knowledgeable Bosnian official should work as a team on this project.

C. Draft Obstruction of Justice Laws

Judges, prosecutors, investigators and witnesses must be protected against threats assaults, intimidation and other forms of conduct aimed at obstructing the judicial process. Also, destruction of evidence must be a crime. Appropriate criminal statutes must be drafted by an experienced prosecutor. Severe punishment is necessary.

Witnesses need to know that they can come forward without fear of reprisal and that they have an obligation to testify truthfully or face prosecution for perjury or contempt.

Witness protection statutes are also needed to protect personal and job security. Similar job protection laws should protect salaries for professionals involved in the criminal justice system.

D. Draft Corporation and Entity Liability Laws

Corporations and other entities, such as political parties, should be held criminally liable for the criminal conduct of their employees or agents. With large criminal fines possible, this liability provides further incentive for organizations to self-police to avoid liability. An attorney experienced in prosecuting corporate crime can draft this law.

E. Review Draft Money Laundering Law; Draft Forfeiture Laws

The post-war cash economy makes Bosnia a haven for money laundering. In addition to enacting law that criminalizes such conduct, forfeiture laws that allow for seizure of goods or monies involved in criminal activity would put teeth in the enforcement system.

F. Definition of “Official” in the Bribery Statute

It is unclear whether the current draft bribery and corruption statutes define the term “official”. This term must be defined broadly to include clearly all civil servants and officials at every level of government. One draft version of the criminal code contained a definition of “official” that was unnecessarily complex and could lead to less-inclusive interpretations that would undercut the corruption statutes.

IV. DEVELOPMENT OF A FEDERATION ENFORCEMENT SYSTEM

Passing anti-corruption laws without developing an effective system for enforcing those laws would be little more than a symbolic gesture. Corruption, fraud and public cynicism will increase. The following steps should be taken to shift from the current enforcement system, which exclusively relies on local Cantonal and Municipal courts, to an effective Federation-wide system.

A. Draft Constitutional Analysis

The Constitution of the Federation of Bosnia and Herzegovina expressly provides that the “Federation Government is to have exclusive responsibility for . . . [c]ombating international and inter-Cantonal crimes, in particular terrorism, drug trafficking and organized crime, and cooperating with Interpol.” (Section III, Article 1(g)).

This section provides constitutional authorization for the establishment of a Federation law enforcement system for fraud and corruption crimes. These crimes are “Inter-cantonal” in that they affect all Cantons as a result of loss of revenues for the Federation and affect the integrity of Federation ministries which exist for all citizens. Further, the massive fraud and corruption crimes perpetrated in the Federation involve established criminal organizations. Thus, it constitutes “organized crime” within the meaning of the Constitution. This interpretation appears to be in harmony with constitutional provisions relating to Federation courts and Cantonal Constitutions which appropriately give local courts original jurisdiction for local crimes. However, given the number of relevant constitutions and the view of some BH government officials that all enforcement must occur at the local level, a formal, comprehensive legal opinion concerning the constitutionality of this proposal is necessary. An attorney experienced in federal law enforcement and a State Department lawyer involved in the drafting of the Dayton Peace Accords would form an effective team to prepare this memorandum.

B. Prepare Legislative Strategy

1. Advocacy Memorandum

First, an advocacy memorandum should be prepared setting forth the above-described constitutional analysis and the practical arguments for developing a Federation enforcement system.

This memorandum should explain how “nationalizing” law enforcement in these select areas involving corruption and large-scale fraud cases would be an important political step toward nation building. In effect, it would require separate cantonal entities unifying together to address serious national problems. A similar structure should be adopted ultimately at the State level. Viewed in this context, solutions to the problems of fraud and corruption could serve as a driving force toward governmental unification. As common needs for economic protection and political integrity are defined and addressed effectively, ethnic hostilities may be diminished.

This advocacy memorandum will be useful in developing support for this action from the U.S. diplomatic officials, the international community and, ultimately, the BH Federation officials.

2. Persuading BH Officials/Building Fraud and Corruption Cases

The second step could take several forms. First, a series of meetings proposing the reforms to key Federation officials could be conducted. Virtually all interviewed during the initial assessment agreed with the need for reform and supported the proposed concept. Obviously, if a consensus of agreement were formed supporting the changes, this would be the most expeditious approach to passing the desired legislation. However, based on the assessment, there are at least two Federation officials in relevant positions who deny the existence of corruption problems and claim that the constitution requires exclusively a local enforcement mechanism. These officials claimed that the media fabricated the stories concerning corruption.

If these officials cannot be persuaded, or replaced by more responsible individuals interested in correcting fraud and corruption, then it would be necessary to demonstrate the need for these reforms in a compelling, public manner. This could be done by deploying a sophisticated team of U.S. investigators and attorneys experienced in fraud and corruption prosecutions to develop and document large fraud and corruption cases that have not been addressed by the government. ITPF could assist. Ideally, cases would be built in a variety of areas (e.g. tax, procurement, customs and banking). Working without investigative powers will make this task delicate and challenging. Experienced professionals sensitive to these concerns must be selected. Also, the final investigative work product likely will fall below American standards. Nevertheless, the evidence developed should illustrate graphically unaddressed fraudulent and corrupt activity. It

should be first presented to the relevant government officials in an effort to begin serious discussions about developing a Federation enforcement system. If the government is resistant, the Ministry of Justice and office of the and Federal Prosecutor should be requested to take immediate investigative and/or prosecutive action on these cases. Simultaneously, the media and the international community should be apprised of the potential criminal cases that have been developed by the international community and presented to the BH Federation for enforcement. This should place appropriate pressure on unresponsive government officials.

OHR proposes the establishment of an anti-corruption unit within OHR . It would be staffed by experienced investigators, prosecutors and judges from the international community and one or two of the best Bosnian prosecutors. The unit is expected to conduct actual criminal investigations. It is unclear whether the unit expects to present cases in court. There does not appear to be legal authority to permit an extra-judicial, international investigative unit to prosecute cases in the Bosnian courts. This approach would supplant the existing governmental structures which need to be implemented successfully. It also would not address the need for long term institution-building and systemic reform. This unit, however, might be useful in conducting preliminary investigations that document existing fraud and corruption cases that should be addressed by the Federation enforcement system. Ultimately, this OHR unit could provide intensive support and assistance to existing law enforcement and prosecution offices, rather than actually perform the government functions. Under this approach, the OHR unit could be a useful part of the legal training plan (described below) as the third component of the overall strategy for long-term systemic reforms to fight corruption and fraud.

In conjunction with this strategy, an effort should be made to quantify the magnitude of these fraud crimes. This is extremely difficult due to the lack of transparency in government and business operations, but an estimate of the millions of DM involved would make the proposal for a Federation-wide enforcement system more persuasive.

Full U.S. diplomatic pressure should be applied to support this effort. Without effective institutions enforcing the rule of law, Bosnia will not transition beyond a military-enforced cease fire. The international community and all donor organizations similarly must join in this effort.

Development of an effective law enforcement system is important for domestic and foreign investors who do not want to risk capital in an unstable, corrupt system. Indeed, the excessive taxes currently imposed on businesses arguably result from massive revenues lost through fraud and corruption. It would be worth exploring whether a coalition of potential investors might be willing to join in the effort to lobby for an effective Federation enforcement system as a prerequisite to capital investment.

A grass roots citizen demand for change is unlikely. Most citizens are poorly informed about democratic processes and lack an expectation of responsible government action.

For this reason, all community education and media programs should include reference to this proposed reform.

In summary, a critical mass for this reform could come from a combination of 1) high level diplomatic pressure from the U.S. and the international community, donor organizations, BH officials, foreign and domestic investors; and 2) documented proof of serious, unaddressed fraud and corruption.

A team of lawyers experienced in complex prosecutions and legislative drafting and lobbying should begin work on this process immediately.

C. Draft Necessary Legislation

A team of lawyers experienced in prosecuting federal corruption and fraud crimes, working with a knowledgeable Bosnian attorney, must draft the necessary legislation for the Federation Court, prosecutors and investigators. This should be done in conjunction with the anti-corruption laws discussed above in Part III. The entire legislative package could be described as a “Federation Enforcement System for Inter-Cantonal and Organized Criminal Activities.” This would emphasize the constitutional empowering language which supports the proposal.

The laws must articulate that jurisdiction in the Federation court is based on criminal activities specified in Section III, Article 1(g) of the Federation Constitution. The laws should provide for an appointment process that produces independent, qualified and trained professionals. Salaries for judges, prosecutors and investigators should be protected to ensure independence in cases that may involve political leaders.

D. Prepare Plan for Investigators

Highly trained, sophisticated and independent investigators are critical to effective enforcement of fraud and corruption laws. At the Canton level the power to decide which cases should be prosecuted should shift from police to prosecutors. Currently, the tradition and experience in Bosnia places too much power in police. This change should also be reflected in the Federation system. Moreover, the best resource for developing a qualified corps of white collar crime investigators is the Financial Police. These inspectors are sophisticated and experienced in business, tax and accounting matters. While they need more training, they should become part of a Federation office of inspectors with responsibility for investigating fraud and corruption.

The Financial Police as an entity lacked full police powers (e.g. arrest authority) and, oddly, worked on a commission basis under which they received a portion of violations detected. This must change. Under the proposed Federation system, properly trained inspectors should have full law enforcement authority and should work exclusively for a salary.

V. LEGAL TRAINING AND COMMUNITY EDUCATION

Every individual interviewed during this assessment expressed a strong need for training and education. This obvious and understandable need must be addressed.

Training programs for judges, prosecutors and government officials concerning the following new laws must be developed: a) public disclosure laws, b) obstruction of justice laws, c) witness protection laws, d) substantive fraud statutes and e) the general criminal code.

Also, law enforcement training programs concerning how to build a complex fraud case must be developed. Police, judges and prosecutors at all levels should receive training. Curricula on these laws and investigative methods should be developed for the Faculty of Criminal Sciences and the Law School. This will ensure long term training needs are met.

An attorney experienced in legal instruction law enforcement training and white collar crime issues should be selected for this assignment.

In addition, a public education program is necessary. Standards of acceptable conduct by government officials and witness protection and obstruction laws should be well understood by all citizens. School curricula and community groups must play a role.

Finally, a media training program would be useful. Investigative reporting plays an important role in ferreting out fraud and corruption and holding officials accountable. Investigative reporting methods and strategies, including the use of public disclosure laws, should be taught. Also, regular reporting of criminal cases, court decisions and law enforcement activities should be promoted and supported.